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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

J. C. LONG, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-12a) is not yet reported. The opinion of the district court (App. D, *infra*, pp. 16a-60a) is not officially reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 13a) was entered on October 28, 1975. A

timely petition for rehearing was denied and a suggestion of rehearing *en banc* was rejected on February 5, 1976 (App. C, *infra*, pp. 14a-15a). By orders of April 26, 1976, and May 27, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 4, 1976 (a Sunday before a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a district court may award compensatory money damages to victims of unlawful discrimination in a suit brought by the Attorney General pursuant to Section 813 of the Fair Housing Act.

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 82 Stat. 81 *et seq.*, provides in relevant part:

Section 812, 82 Stat. 88, 42 U.S.C. 3612, entitled "Enforcement by private persons:"

> (a) * * * The rights granted by sections 3603, 3604, 3605 and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. * * *
>
> * * * * *
>
> (c) * * * The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other

> order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Section 813, 82 Stat. 88, 42 U.S.C. 3613:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT

Respondent J. C. Long is the owner of respondent Worth Agency, a real estate agency which rents apartments and houses in 15 separate apartment complexes and housing subdivisions in or near Charleston, South Carolina (App. D, *infra*, pp. 16a-

17a, 18a-19a). Eleven of these properties (containing approximately 365 units) have been occupied almost exclusively by white persons; four of the properties (containing 40 units) are occupied primarily by black persons (*id.* at 19a).

On December 27, 1971, the United States, pursuant to Section 813 of the Fair Housing Act, 82 Stat. 88, 42 U.S.C. 3613, brought this action against respondents. The complaint alleged that respondents made housing unavailable to black persons on account of their race and that this conduct both constituted a pattern and practice of resistance to the full enjoyment of rights secured by the Fair Housing Act and was a denial of rights raising an issue of general public importance. The complaint sought injunctive relief and "such additional relief as justice may require."

The case was tried without a jury on October 29 and 31, 1973. The district court entered its findings of fact and conclusions of law on January 14, 1974. The court found that the racial separation in the housing units rented by respondents was the result of racial discrimination practiced by them. It determined that "[p]rior to the passage of the Fair Housing Act, [respondents] admittedly pursued a policy of racial discrimination" (App. D, *infra*, p. 19a) and that after the effective date of the Act respondents "continued to make some dwellings available to whites only and other dwellings available to

blacks" (*id.* at 20a-21a).[1] This discrimination, the court held, "affected a large number of black persons in the Charleston area" (*id.* at 27a). The court entered injunctive relief and required respondents to correct the effects of their unlawful actions (*id.* at 48a-53a). The court's order also provided for an award of "monetary damages, to persons who are able to prove that they have been discriminated against" by respondents (*id.* at 54a) and for the appointment of a special master to hear such claims (*id.* at 55a).

The district court believed that the award of money damages in a suit brought under Section 813 was necessary in order to enable black persons to secure the "full enjoyment" of their rights under the Fair Housing Act. It recognized that Section 813 does not explicitly provide for compensatory money damages, but it reasoned that money damages should be available under the district court's power to enter "other order[s]", in addition to those explicitly enumerated, in order fully to achieve the Act's purposes. App. D, *infra*, pp. 44a-47a. Recognizing, however, that the availability of money damages in a suit under Section 813 is a novel and important question, the district court certified two questions to the court of appeals for interlocutory decision pursuant to 28 U.S.C. 1292(b) (*id.* at 56a; footnote omitted):

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[1] The district court's opinion fully describes the deliberate and pervasive devices by which respondents and their employees accomplished this end. See App. D, *infra*, pp. 20a-33a.

(1) Whether, in a suit brought by the Attorney General under Section [813] of the Act, affirmative relief in the form of monetary damages, may be awarded to the individual victims of discrimination; and,

(2) If so, whether defendants are entitled to a jury trial on the issue of such monetary relief.

The court of appeals accepted the certified questions and reversed. It emphasized the fact that Section 813 speaks of an award of "preventive relief." Because, in the court of appeals' view, compensatory money damages cannot be characterized as "preventive relief," it concluded that money damages are not included within the authorization to enter "other order[s]" to carry out the Act's purposes. In light of its conclusion that compensatory money damages are not available in a suit prosecuted under Section 813, the court of appeals had no occasion to consider whether a jury trial is required before such damages may be assessed.

After the United States filed a petition for rehearing and suggestion of rehearing *en banc*, the court of appeals amended its opinion to make it clear that monetary relief can be awarded under Section 813 when that is appropriate as a form of restitution (App. A, *infra*, pp. 6a-7a). In discussing the items of equitable restitution that might be available, the court wrote (*id.* at 12a):

> At this stage the record does not disclose whether any security deposits were required of black but not of white tenants, nor does it indicate whether blacks were required to pay more for comparable housing. Any such discriminatory deposits or overcharges would, of course, properly be the subject of restitution. * * * Accordingly, upon the remand the district court should determine what, if any, sums subject to equitable restitution were deposited or paid, and order appropriate refunds together with interest.

In all other material respects, however, the court of appeals adhered to its original opinion.

REASONS FOR GRANTING THE PETITION

1. The Fair Housing Act prohibits discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of housing. The Act establishes several methods of enforcing the rights it creates; one of the most important is suit by the Attorney General against persons engaging in a "pattern or practice" of discrimination, or whose discrimination "raises an issue of general public importance" (Section 813). Suits brought by the Attorney General under Section 813 attack the most entrenched sorts of housing discrimination, and discrimination with the most far-reaching effects. They attack discrimination that has affected many persons—often so many persons that suits for damages by each individual are neither practicable nor desirable in a judicial system with limited resources.

The Attorney General has brought 237 suits under the authority of Section 813. The effectiveness of these suits as a tool for ending and rectifying the effects of entrenched discrimination depends in large

measure upon the type of relief a district court can grant. And this Court has recognized that effective relief usually entails monetary relief. As it wrote in discussing back pay awards under Title VII of the Civil Rights Act of 1964 (*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418; citations omitted):

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide(s) the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page of this country's history."

Under the decision of the court of appeals respondents and others like them would have "little incentive to shun practices of dubious legality." The damages suffered by each prospective tenant or buyer —such as the higher rent or price paid to obtain nondiscriminatory housing,[2] damages caused by embarassment and humiliation, and the direct harm caused by the loss of civil rights—would in many instances go uncompensated. The sums involved for each prospective tenant or purchaser often are not sufficient to

[2] The court of appeals would allow restitution of overcharges collected by respondents from their own tenants, but apparently would not allow compensation to make whole prospective tenants and buyers with whom respondents refused to deal on account of race, and who consequently were required to pay higher prices or rents to obtain housing from someone else.

support separate lawsuits, and a class action on behalf of all prospective tenants or buyers may be difficult to maintain. The inclusion of compensation to the victims as a remedy in a suit brought by the Attorney General has been a powerful enforcement device under the Fair Housing Act, and the decision of the court of appeals accordingly would significantly impede the government's efforts to eradicate discrimination in the sale or rental of housing.[3] Because of the importance of the instant decision to the program of enforcement under the Act, and the existence of a conflict among the district courts,[4] we believe that the

[3] In *United States* v. *Fogelman Management Co.*, P.H.E.O.H. Rptr. ¶ 18008 (W.D. Tenn., No. C-76-45, decided February 5, 1975), the defendants agreed to offer more than $150,000 in free rent (or a lesser amount in cash) to more than 300 individuals who were denied rental opportunities because of their race. Other cases have produced relief of this sort, but it would be impermissible under the court of appeals' decision in this case.

[4] Cases holding that compensatory money damages are available: *United States* v. *Berg Enterprises, Inc.*, S.D. Fla., No. WPB-75-139-CIV-CF, decided December 10, 1975; *United States* v. *Chatham*, N.D. Ga., No. 75-1272A, decided December 24, 1975; *United States* v. *Hilton-Sykes Rental Agency, Inc.*, P.H.E.O.H. Rptr. ¶ 13,727, M.D. Fla., No. 74-322-Civ. T-H, decided September 18, 1975; *United States* v. *West Suburban Board of Realtors*, P.H.E.O.H., Rptr. ¶ 13,641, N.D. Ill., No. 69-C-1460, decided February 6, 1974.

Cases holding that compensatory money damages are not available: *United States* v. *Mitchell*, N.D. Tex., No. 3-7887-G, decided June 16, 1976; *United States* v. *Dittmar*, E.D. Va., No. 193-75-A, decided November 21, 1975; *United States* v. *Northside Realty Associates, Inc.*, N.D. Ga., No. 13932, decided February 11, 1976. (In both *Dittmar* and *Northside* the dis-

Court should consider this case even though it is the first appellate decision to consider this question.[5]

2. Section 813 provides that the Attorney General may seek such relief, including an injunction or "other order," "as he deems necessary to insure the full enjoyment of the rights granted" by the Act. In this case the Attorney General "deems necessary" an "order" awarding compensatory money damages to the victims of respondents' discrimination. The district court agreed that such an order is necessary to ensure the "full enjoyment" of the victims' rights.

Section 813 does not explicitly authorize or forbid the award of compensatory money damages to the victims of unlawful discrimination. The legislative history does not resolve the ambiguity of the statute. The Fair Housing Act was introduced on the Senate floor as an amendment to the Civil Rights Act of 1968; the amendment was approved without change by the House. See 114 Cong. Rec. 2270, 3422, 4570-4573, 5992, 9621 (1968). There are no committee reports.

Although the legislative history does not dispell

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trict courts reversed, in light of the instant case, earlier decisions that damages are available.)

A case presenting this question was argued in the Fifth Circuit in May 1975 and is now *sub judice*. *United States* v. *Pelzer Realty Co.*, C.A. 5, No. 74-3085.

[5] The Court followed this course in *Curtis* v. *Loether*, 415 U.S. 189, 191 n. 2, which presented another important question in the enforcement of the Fair Housing Act.

the ambiguity in the statute,[6] the overall statutory plan is of substantial assistance. In view of the "large objectives of the Act" (*Hecht Co.* v. *Bowles*, 321 U.S. 321, 331), "the 'natural way' to draw the line 'is in light of the statutory purpose'" (*United States* v. *An Article of Drug . . . Bacto-Unidisk*, 394 U.S. 784, 799, quoting from *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 124-125).[7]

The purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States" (Section 801, 42 U.S.C. 3601). Congress has recognized that compensatory money damages are a necessary tool to attain that end and explicitly has provided for such damages in suits by private individuals. See Section 812(c), 42 U.S.C. 3612(c). By authorizing the Attorney General to seek such relief as "he deems necessary to insure full enjoyment of the rights granted" by the Act, Congress implicitly authorized the Attorney General to seek monetary relief. This is so whether the words "full enjoyment of the rights granted" by the Act refer to substantive rights or remedial rights: if the words refer to remedies, then "full enjoyment" includes money damages be-

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[6] The Court has characterized the legislative history of the Act as "not too helpful." *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210.

[7] Cf. *Brown* v. *General Services Administration*, No. 74-768, decided June 1, 1976; *Chandler* v. *Roudebush*, No. 74-1599, decided June 1, 1976.

cause Section 812(c) creates a right to money damages; if the words refer instead to the right to nondiscrimination in housing, then money damages are available in a suit commenced under Section 813 because Congress had declared (in Section 812(c)) that compensatory money damages are an essential tool to induce sellers and renters to quit their discrimination.[8] There is no reason to require multiple suits—one by the Attorney General and many more by private victims of discrimination—with all the problems and demands upon judicial resources such a procedure would entail, when one suit would do fully as well.

If there is any uncertainty in this, the Court should resolve it by giving Section 813 the same "generous construction" it found appropriate for Section 810 of the Fair Housing Act. *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212. The statutory interpretation we urge here would resolve the ambiguity in favor of complete relief to the injured victims; that construction is supported by both the structure and the spirit of the Act.

It is also supported, as was the case in *Trafficante*, by the consistent administrative interpretation of the statute, which is entitled to great weight (409 U.S. at 210). The Secretary of Housing and Urban Development regularly includes compensatory monetary relief in conciliation agreements approved under Section 810 of the Act, although Section 810 does not explicitly provide for such relief. In light of that practice, it would be anomalous if the Attorney General were precluded from seeking compensatory monetary relief in suits brought under Section 813.

[8] Cf. *Franks* v. *Bowman Transportation Co.*, No. 74-728, decided March 24, 1976, slip op. 12-13; *Louisiana* v. *United States*, 380 U.S. 145, 154.

3. The court of appeals held, however, that Section 813 allows only "equitable restitution" and not compensatory money damages. It believed that its construction of the statute is required because Section 813 authorizes the Attorney General to seek "preventive relief." In the court's view, the "other order[s]" that the Attorney General may "deem[] necessary to insure the full enjoyment of the rights granted" by the Act are limited to "preventive" orders. A compensatory order is not "preventive," the court concluded, and so is not authorized.

In the first place, it is far from clear that the term "preventive relief" modifies "other order." The most natural reading of Section 813 is that the Attorney General may request two sorts of relief: (a) "preventive relief, including * * * a permanent or temporary injunction * * *;" and (b) any "other order * * * as he deems necessary to insure the full enjoyment of the rights granted" by the Act.

Even assuming, *arguendo*, that "preventive relief" modifies "other order," we submit that the court's reading of the statute reflects an unnecessarily narrow understanding of "preventive" relief. The prospect of compensatory damages is probably the greatest deterrent to unlawful action that the Act creates. Each renter or seller is moved to comply

with the Act on pain of being mulcted in damages. Damages are undoubtedly a "preventive" device as well as a purely compensatory one. That is why a private suit for private damages also serves the role of a suit by a "private attorney general." See *Trafficante, supra.*

Beyond that, the decision of the court of appeals, which (wrongly, in our view) equates "preventive relief" with "equitable" relief, is based upon a distinction between "equitable" and "legal" relief that has in large measure been abandoned. Except to the extent necessary to determine when a jury trial is available (*Curtis* v. *Loether*, 415 U.S. 189) or whether it is proper to issue an injunction (*Sampson* v. *Murray*, 415 U.S. 61), it is not necessary to distinguish between "legal" and "equitable" relief. See Fed. R. Civ. P. 2. "Equitable relief" often includes money damages, as in *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 399, in which the Court wrote: "But where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." See also *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 204.

The court of appeals relied upon *Porter*; and, it is true, certain language in that opinion indicates (see 328 U.S. at 401-402) that compensatory money damages (as opposed to monetary restitution) were not available in an injunctive action to halt violations

of the price control act then in effect. But that statute did not authorize the federal official to seek such relief as he "deems necessary to insure the full enjoyment" of the rights conferred upon private individuals. *Porter* was decided as a matter of statutory construction involving a different statute; it establishes no watertight division between equitable and legal remedies, as the court of appeals supposed.[9]

The task of eliminating discrimination from this Nation's housing has not been a simple one. This is not the time to give the congressional grants of enforcement authority to achieve that purpose their narrowest possible reading. Much remains to be accomplished, and the combined efforts of federal and private litigants must be bent to the task. Just as private litigation serves an important public function by hastening the end of discrimination to the

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[9] Certain statements in *United States* v. *Johnson*, 390 U.S. 563, are also distinguishable in a similar fashion. *Johnson* held that Section 206(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000a-5), which is similar to the language of Section 813, does not preclude criminal prosecutions of "outside hoodlums" under 18 U.S.C. 241. The Court stated (390 U.S. at 567) that Section 206(a) precludes an award of monetary relief against the proprietor or owner of covered public accommodations in a suit commenced by the Attorney General. We submit that these remarks of the Court in *Johnson* reflect the conscious decision of Congress in the statute there under consideration to prohibit monetary relief in any form, whether sought by the Attorney General or by private plaintiffs. The legislative history clearly indicated that monetary relief was to be prohibited. There is no similar legislative history for the Fair Housing Act; quite the contrary, Congress made monetary damages a central feature of the enforcement scheme. See Section 812(c).

benefit of all, so too public litigation should also serve a private function by ensuring complete relief to the victims of discrimination. Only then can the victims obtain the "full enjoyment" of their rights. In ruling to the contrary, the court of appeals ignored the structure and fundamental purpose of the Fair Housing Act. Its judgment should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1976.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1398

UNITED STATES OF AMERICA, APPELLEE

versus

J. C. LONG, individually and as Executor of the Estate of Frank J. Sottile, and the WORTH AGENCY, a partnership, APPELLANTS

Appeal from the United States District Court for the District of South Carolina, at Charleston. Charles E. Simons, Jr., District Judge.

Argued May 5, 1975 Decided October 28, 1975

Before RUSSELL and FIELD, Circuit Judges, and THOMSEN, Senior District Judge.*

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* Honorable Roszel C. Thomsen
District of Maryland
By designation.

Leonard L. Long, Jr., (Peter DeLuca, Jr., Robert A. Patterson, Ellison D. Smith, IV, and J. C. Long, on brief) for Appellants; Martin Barenblat, Attorney, United States Department of Justice; (J. Stanley Pottinger, Assistant Attorney General, United States Department of Justice; Frank E. Schwelb, Robert N. Eccles, Attorneys, United States Department of Justice, and John K. Grisso, United States Attorney, on brief) for Appellee.

FIELD, Circuit Judge:

The Attorney General of the United States instituted this action against the defendants pursuant to Section 813 of the Civil Rights Act of 1968 (hereinafter Act)[1] which authorizes him to bring a civil action to obtain "preventive relief" for violations of Title VIII, the fair housing provisions of the Act. Section 813 reads as follows:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter."

[1] Pub. L. 90-284, 82 Stat. 88, 42 U.S.C. § 3613.

The case was tried to the court and the district judge, in his findings of fact, determined that the manner in which the defendants had conducted their residential real estate business was violative of Section 804 of the Act[2] and constituted a pattern and practice of racial discrimination. It was further found that the discriminatory policies of the defendants affected a group of persons and raised an issue of general public importance. For these reasons the court concluded that this action under the provisions of Section 813 was appropriate.

In a comprehensive and definitive order the district court enjoined the defendants from engaging in racially discriminatory conduct which denies fair housing to any person, and further required that certain affirmative measures be taken to assure compliance with the Act.[3] In addition to the foregoing measures, the order provided for an award of "monetary damages" to persons who are able to prove that they have been discriminated against by the defend-

[2] 42 U.S.C. § 3604.

[3] The opinion and order of the district court is not officially reported, but may be found in P-H *Equal Opportunity in Housing* ¶ 13,631 (D. S.C. Jan. 14, 1974).

ants * * *." The order specified a procedure under which possible victims of the defendants' discriminatory conduct could present their claims for such "monetary damages" to a Special Master. The Special Master was authorized to conduct hearings and make findings with respect to such claims and, where appropriate, recommend to the court that an award of monetary damages be paid to claimant by the defendants.

Recognizing the absence of controlling precedent with respect to monetary damages, the district court, acting pursuant to 28 U.S.C. § 1292(b), certified two questions for our consideration:

> (1) Whether, in a suit brought by the Attorney General under Section 3613 of the Act, affirmative relief in the form of monetary damages, may be awarded to the individual victims of discrimination; and,
>
> (2) If so, whether defendants are entitled to a jury trial on the issue of such monetary relief.

We agreed with the district judge on the importance of these questions and permitted the appeal to be taken.

In considering the questions certified by the district court, we note that Title VIII provides three channels for relief from discriminatory housing conduct. First of all, Section 810 of the Act[4] provides that any aggrieved person may file a complaint with the Secretary of Housing and Urban Development

[4] 42 U.S.C. § 3610

who may then attempt to correct the alleged discriminatory practice through administrative action. Second, Section 812[5] authorizes private plaintiffs to bring civil actions and provides that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees * * *." While the foregoing statutory sections provide a means for redress by aggrieved individuals, Section 813 authorizes the Attorney General, in a matter of "general public importance," to institute an action seeking "preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order * * *."

A literal reading of Section 813 indicates that the "preventive" relief is equitable in nature and designed to restrain or enjoin "the pattern or practice of denial of rights" granted under Title VIII; and we do not think that the phrase "or other order" should be seized upon to broaden the scope of relief to include legal remedies such as damages. Fairly read in their statutory context, these words contemplate an order extending or implementing the equitable relief to be granted. Such an "other order" may be a mandatory injunction such as that in *United States* v. *West Peachtree Tenth Corporation*,

[5] 42 U.S.C. § 3612

437 F.2d 221 (5 Cir. 1971), or a declaratory judgment as entered in *United States* v. *Hunter*, 459 F. 2d 205 (4 Cir. 1972).[6] In each of those cases the district court molded its decree to fit the needs of the particular case and the decrees fell within the term "other order" because they served the preventive function of ending discrimination in housing. Under this analysis, it was appropriate for the district court in the present case to follow the precedent of *West Peachtree* and order affirmative action requiring the defendants, among other things, to adopt new and nonracial standards in their business practices; to post all available housing; to display the slogan "Equal Housing Opportunities" on all advertisements and displays; and to make periodic reports on the racial occupancy of their rental property. All of these affirmative requirements were appropriate equitable measures, but in ordering the award of monetary damages to individuals, we think the district court went beyond the bounds of equitable relief and exceeded its authority under Section 813.

In reaching our conclusion we, of course, distinguish *monetary damages* from equitable *monetary relief*. We recognize that a court of equity may, and often does, award monetary relief in the form of restitution in order to accomplish justice in a given

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[6] In United States v. Hunter, 459 F.2d at 219, n.19, Judge Sobeloff observed:

> "It is difficult to imagine what the phrase 'or other order' possibly encompasses if not declaratory relief."

case. Such relief was recognized by the Court in *Porter* v. *Warner Co.*, 328 U.S. 395 (1946), which involved an enforcement proceeding under Section 205(a) of the Emergency Price Control Act of 1942,[7] a statute somewhat similar to Section 813. Holding that the court in such a proceeding had power to order restitution of rents which had been collected in excess of the permissible maximum, the Court stated:

> "a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked. * * *.
>
> * * * *
>
> An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:
>
> (1) It may be considered as an equitable adjunct to an injunction decree * * *.
>
> (2) It may be considered as an order appropriate and necessary to enforce compliance with the Act."

328 U.S. at 398-400. It is clear, however, that the Court was addressing itself to the equitable remedy of restitution as distinguished from damages which are properly recoverable in an action at law. The distinction, as we see it, is that "[a] person obtains restitution when he is restored to the position he formerly occupied either by the return of something

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[7] 56 Stat. 23, 33.

which he formerly had or by the receipt of its equivalent in money." RESTATEMENT OF RESTITUTION § 1, Comment: a, at 12 (1937). Damages on the other hand, are determined by reference to the loss sustained by a victim as the result of wrongful conduct on the part of another. Thus, in *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577, 581, n. 8 (4 Cir. 1966), we pointed out that a claim for back pay in an employment discrimination suit "is not one for damages; it is an integral part of the equitable remedy of reinstatement, and should be determined by the Court."

In the present case, of course, the effect of the defendants' discriminatory conduct has been to deny blacks an equal opportunity to obtain housing. The damages suffered by the victims of such conduct may be the expense of obtaining nondiscriminatory housing, or of an intangible nature such as the embarrassment attendant upon being relegated to substandard housing. The possibilities are numerous,[8] of course, but they have one thing in common—they are damages properly recoverable in a court of law. In

[8] *See* Jeanty v. McKey and Poague, Inc., 496 F.2d 1119 (7 Cir. 1974) (actual expenses as well as emotional distress and humiliation); Steele v. Title Realty Co., 478 F.2d 380 (10 Cir. 1973) (moving and storage costs, out of pocket expenses, emotional distress and humiliation); Smith v. Sol D. Adler Realty Company, 436 F.2d 344 (7 Cir. 1970) (loss of civil rights and mental anguish); Kelly v. Armbrust, 351 F.Supp. 869 (D. N.D. 1972) (inconvenience, mental anguish, humiliation, embarrassment, expenses, and deprivation of constitutional rights).

Curtis v. *Loether*, 415 U.S. 189, 195-196 (1974), decided after the trial in the court below, the Court, in considering the question of the right to a trial by jury in an action for damages under Section 812 of the Act, made the following observation which we think bears significantly upon the case before us:

> "We think it is clear that a damage action under § 812 is an action to enforce 'legal rights' within the meaning of our Seventh Amendment decisions. See, e.g., *Ross* v. *Bernhard*, *supra*, at 533, 542; *Dairy Queen, Inc.* v. *Wood*, *supra*, at 476-477. A damage action under the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." (Footnotes omitted).

The government urges that we analogize the present case to those Title VII employment discrimination cases where the courts have awarded back pay as a part of complete equitable relief. Concededly, such relief has been granted both in private suits under 42 U.S.C. § 2000e-5[9] which specifically pro-

[9] 42 U.S.C. § 2000e-5 reads in part as follows:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in

vides for back pay, characterizing it as equitable relief,[10] as well as suits brought by the Attorney General under 42 U.S.C. § 2000e-6 which latter section carries no specific provision for back pay.[11] The rationale of these cases is that victims of employment discrimination should be restored to their rightful place by an award of back wages which they would have received but for the wrongful discrimination. In such event, the employer is required to disgorge money which is rightfully owing to the employee and such monetary relief is simply an incident of reinstatement which is authorized by the statute.

Restitution in the form of back wages in these Title VII cases, however, affords no precedent for an award of general legal damages in a Title VIII Fair Housing case. The distinction between the two was drawn by the Court in *Curtis* v. *Loether*, *supra*, when it stated:

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such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other *equitable relief* as the court deems appropriate." (Emphasis added.)

[10] *See* Albemarle Paper Co. v. Moody, Slip Opinion June 25, 1975, 43 U.S.L.W. 4880; Hairston v. McLean Trucking Co., 74-1750 (4 Cir. August 6, 1975); Meadows v. Ford Motor Co., 510 F.2d 939 (6 Cir. 1975); Robinson v. Lorrilard [*sic*] Corp., 444 F.2d 791 (4 Cir. 1971).

[11] *See* United States v. Georgia Power Company, 474 F. 2d 906 (5 Cir. 1973); United States v. Hayes International Corporation, 456 F.2d 112 (5 Cir. 1972).

> "Nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. Whatever may be the merit of the equitable characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief." 415 U.S. at 197.

In noting this distinction, it is apparent that the Court agreed with the analysis of the Seventh Circuit, *Rogers* v. *Loether*, 467 F.2d 1110, 1121-22:

> "It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution. Restitution is clearly an equitable remedy. As Professor Moore put it:
>
> > 'In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge illgotten gains or to restore the status quo, or to accomplish both objectives.'
>
> The retention of 'wages' which would have been paid but for the statutory violation (of improper discharge) might well be considered 'illgotten gains'; ultimate payment restores the situation to that which would have existed had the statute not been violated.
>
> The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by rea-

son of a breach of duty by defendant. Such damages, as opposed to rent overcharges, unpaid overtime wages, or back pay, cannot properly be termed restitution." (Footnotes omitted).

In the light of the foregoing, we conclude that in a suit brought by the Attorney General under Section 813 of the Act, general monetary damages may not be awarded to the individual victims of discrimination. Our conclusion on the question of legal damages, however, does not preclude the district judge from consideration of any items which are appropriately the subject of equitable restitution. At this stage the record does not disclose whether any security deposits were required of black but not of white tenants, nor does it indicate whether blacks were required to pay more than whites for comparable housing. Any such discriminatory deposits or overcharges would, of course, properly be the subject of restitution. This, we think, is the clear teaching of *Porter* v. *Warner*, *supra*, as well as *Rogers* v. *Loether*, *supra*. Accordingly, upon the remand the district court should determine what, if any, sums subject to equitable restitution were deposited or paid, and order appropriate refunds together with interest.

In view of our conclusion upon the question of damages it is unnecessary for us to address ourselves to the jury trial issue. The case is remanded to the district court for further proceedings consistent with this opinion.

REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed Oct. 28, 1975, William K. Slate, II, Clerk]

No. 74-1398

UNITED STATES OF AMERICA, APPELLEE

vs.

J. C. LONG, individually and as Executor of the Estate of Frank J. Sottile, and the WORTH AGENCY, a partnership, APPELLANTS

JUDGMENT

Appeal from the United States District Court for the District of South Carolina

THIS CAUSE came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the case is remanded to the District Court for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate
Clerk

APPENDIX C

[Filed Feb. 5, 1976; William K. Slate, II, Clerk]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1398

UNITED STATES OF AMERICA, APPELLEE

v

J. C. LONG, individually and as executor for the Estate of Frank J. Sottile and the WORTH AGENCY, a partnership, APPELLANTS

Appeal from the United States District Court for the District of South Carolina, at Charleston. Charles E. Simons, Jr., District Judge.

ORDER

Upon consideration of the petition for rehearing and of the petition for rehearing en banc; now, therefore, with the concurrence and approval of the other members of the panel and in the absence of a request

for a poll of the entire court, as provided by Appellate Rule 35(b), it is ADJUDGED and ORDERED that the petition for rehearing is denied.

It is further ORDERED that the opinion in this case be revised. The Clerk is directed to substitute new pages 9, 12 and 14 for those in the original opinion and to cause a new "REVISED OPINION" to be circulated and published.

/s/ John A. Field
United States Circuit Judge

APPENDIX D

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action No. 71-1261

[Original filed Jan. 15, 1974, Miller C. Foster, Jr.]

UNITED STATES OF AMERICA, PLAINTIFF

—versus—

J. C. LONG, Individually and as Executor of the Estate of Frank J. Sottile, and WORTH AGENCY, a partnership, DEFENDANTS

ORDER

The United States of America instituted this action on December 27, 1971, pursuant to Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act), 42 U.S.C. § 3601, *et seq.*, against the defendant, J. C. Long, individually and as Executor of the Estate of Frank J. Sottile, and against the defendant, Worth Agency. The Worth Agency is engaged in the sale, rental and management of apartments, houses and other dwellings in the Charleston, South Carolina, metropolitan area. The defendant, J. C. Long, is the controlling partner in Worth Agency, and is, through various other business entities, engaged in the development, construction, ownership, sale, rental, management and maintenance of apart-

ments, houses, and other dwellings in the Charleston, South Carolina, metropolitan area and throughout the State of South Carolina.

Since the commencement of this action, the Estate of Frank J. Sottile has been closed and J. C. Long discharged as Executor of the Estate. The interest of the Estate of Frank J. Sottile in Worth Agency has been p[illegible]chased by J. C. Long.

The Complaint alleges that in various ways the defendants have made dwellings unavailable to black persons because of race. It alleges that this discriminatory conduct of the defendants constitutes a pattern and practice of resistance to the full enjoyment by black persons of the right to equal housing opportunity, and a denial to a group of persons of rights granted by the Fair Housing Act, which allegedly raises an issue of general public importance.

The case was tried during the October 1973 Term of this court. Before and during the trial defendants moved the court to disallow so much of the relief sought by the United States as would provide affirmative relief, including monetary damages, to individuals in a suit by the Attorney General rather than one by such individuals. The court ruled that such relief for individuals was available in suits by the Attorney General pursuant to 42 U.S.C. § 3613, and that, if discrimination were found, the matter of monetary payments to the individual claimants would be referred to a special master. The defend-

ants filed various other motions, all of which were denied by oral Order.[1]

Based on the record before the court, it makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. The defendant, Worth Agency, is engaged in the sale, rental, and management of apartments, houses, and other dwellings in the Charleston, South Carolina area. The defendant, J. C. Long, is the owner of Worth Agency. In addition, he is, through various other business entities, engaged in the construction, development, ownership, management, sale, and rental of apartments, houses, and other dwellings in Charleston, South Carolina; and elsewhere in this state.

2. Worth Agency rents apartments and houses in 15 separate apartment complexes and subdivisions in

[1] In addition to a Motion for a More Definite Statement, these included Motions to Dismiss on the grounds (1) that suits alleging racial discrimination in housing must be brought under 42 U.S.C. § 1982, not 42 U.S.C. § 3601, *et seq.;* (2) that the Attorney General is not authorized to bring suit under 42 U.S.C. § 3613 when there exists individual alleged victims of discrimination who may have private rights of action; and (3) that 42 U.S.C. § 3613 is unconstitutionally vague and unconstitutionally denies defendants (a) trial by jury, and (b) vested rights in dwellings constructed before the effective date of the statute.

the Charleston area. Of these properties, eleven[2] (totalling about 365 units) have been occupied almost exclusively by white persons, while four[3] (totalling 40 units) are occupied primarily by black persons.[4]

3. The racial segregation shown by the above statistics is not accidental. Prior to the passage of the Fair Housing Act, the defendants admittedly pursued a policy of racial discrimination. Defendant J. C. Long testified in his deposition[5] that his policy was not to sell or rent dwellings in white areas to black persons, and that blacks seeking housing in white areas would simply be told that such property was not available to them.

Mr. Long also testified that, following the enactment of the Fair Housing Act, he realized that he

[2] Shoreview Apartments (78 units); Rivercrest Apartments (76 units); St. Angela Apartments (20 units); St. Regis Apartments (8 units); Charlotte Street Apartments (13 units); Dorchester Terrace and Dorchester Terrace #6 (49 units); Waylyn and Waylyn #4 (53 units); Nafair (7 units); Ashley Forest (4 units); Brookgreen Meadows (36 units); Miscellaneous Properties (20 units).

[3] Mary Street Apartments (8 units); St. Charles Apartments (10 units); Mayflower Court Apartments (14 units); St. James Apartments (8 units).

[4] Worth Agency also manages the 150-unit Ashley Shores complex which is integrated, but Worth has not had any role in choosing the tenants, who are selected by the U. S. Naval Housing Office.

[5] Because of illness Mr. Long was not able to attend the trial in person and his deposition was introduced in evidence by plaintiff.

could no longer legally refuse to sell or rent dwellings to black persons solely because of race, but he believed that he could legally instruct his employees to keep black prospects away from predominantly white apartments and subdivisions by various means, such as not encouraging blacks to rent or purchase housing units in white areas; by telling blacks who did not request any specific area only about dwellings in black areas; if a black inquired about a dwelling in a white area, his employees would encourage him to seek dwellings in predominantly black areas.

Mr. Heil, Worth Agency's rental manager, and Mr. Beck, its sales manager, testified in their depositions that they followed the policies and practices described in Mr. Long's testimony. Mr. Beck, who had been sales director of Worth Agency since 1967, also testified that he had received no instructions regarding the Fair Housing Act, that he was not familiar with it, had never read it, did not know what it was, and it had had no effect on the rental or sales practices of Worth Agency. Mrs. Taylor, a rental employee, testified that she had "heard something about it (the Act) nothing particular." This lack of meaningful instructions was confirmed by Julius Wannamaker, a Worth Agency sales agent for fifteen years, and by Shirley Bessent, a former rental employee.

The practical result of Mr. Long's policies was that, even after the Fair Housing Act became effective, the defendants continued to make some dwellings available to whites only and other dwellings available to blacks.

4. Until August 1971, of the approximately 400 dwellings for which the Worth Agency selected tenants, only the 8-unit Mary Street Apartment, which is located in an undesirable and predominantly black area of the city, was available to blacks. In the summer of 1971, Mr. Long and Mr. Heil had a discussion as to what should be done about the St. Charles Apartments, located in what had become "mostly a colored neighborhood." The alternatives Mr. Long suggested were (1) to repair and renovate the apartments, or (2) to notify the current (white) tenants that Worth Agency was willing to move them to other apartments, and then rent the St. Charles "to colored as well as white." Mr. Lo[illegible] testified that a decision was made not to renovate, and around August 1971, an additional 32 units in three complexes, the St. Charles, St. James and Mayflower Court, were made available to blacks.

5. The St. Charles, St. James, Mayflower Court, St. Angela, and St. Regis are five "sister" apartment complexes owned by Albert Sottile and rented through Worth Agency. At these five complexes credit checks were conducted and security deposits were required of virtually all black tenants, and of only a few white tenants. Susan Shapiro, a Department of Justice research analyst, who made a comprehensive analysis of Worth Agency records, testified that the records with respect to these five apartment complexes revealed the following:

Complex	No. of Applications In File	Credit Checks Conducted [6]	Security Deposits Required
Mayflower Court			
Whites	37	2	1
Blacks	8	7	8
St. Charles			
Whites	31	3	0
Blacks	9	9	9
St. James			
Whites	15	5	0
Blacks	6	5	6
St. Angela			
Whites	45	1	1
Blacks	0	—	—
St. Regis			
Whites	19	3	3
Blacks	0	—	—
TOTALS			
Whites	147	14	5
Blacks	23	21	23

Both Mrs. Taylor and Mr. Heil admitted in their depositions that security deposits had not been required at the St. Charles, St. James, and Mayflower Court Apartments until these complexes were made available to blacks; but they claimed that the change in policy at these complexes at that time was not

[6] Both Mr. Heil and Mrs. Taylor testified that credit checks are conducted by telephone and that the information obtained is placed either on the back of the application form or on a separate piece of paper which is attached to the application form. Miss Shapiro's testimony as to the number of credit checks conducted for whites and blacks was based on the number of black and white applications marked in the manner described by Mr. Heil and Mrs. Taylor.

because of race. It is nevertheless clear that while credit checks and security deposits were required in September 1971 at the three newly integrated buildings no such requirements were imposed at the two "sister" complexes, St. Angela and St. Regis, which remained all white. Mr. Long and Mr. Heil corroborated the racial disparities evident from the records and testified that there was no objective procedure for determining whether to conduct a credit check on a particular applicant, and they admitted that credit checks were more often conducted of blacks than of whites.

6. James B. Hester, Housing Manager at the Charleston Naval Station, testified that in late 1968 or early 1969 as a follow-up to a letter sent jointly by the Navy and Air Force, he and an Air Force Colonel visited Worth Agency seeking assurances of nondiscrimination. At that visit, the rental manager at Worth Agency told him that the Shoreview and Rivercrest Apartments were not available to blacks, and that the owner of these apartments, whom he was told was Mr. Long, would rather leave the apartments vacant than rent them to blacks. At subsequent visits to Worth Agency during 1969 and 1970, Mr. Hester was told that there had been no change in the previously stated policy. Mr. Heil, the Worth Agency rental manager, confirmed that he had told Mr. Hester that only the Mary Street and Ashley Shores apartments were available to blacks, and that he had subsequently advised Mr. Hester that no other areas had been opened up to blacks.

Although Mr. Heil testified that he had not signed any Department of Defense assurance of nondiscrimination he, in fact, did sign one in September 1971, as to the St. Charles, St. James, and Mayflower Court Apartments, (Pl. Ex. #2), and he admitted that, after the decision had been made to "open up" these three complexes to all races, he informed Mr. Hester of the decision.

7. The record supports the conclusion that since the passage of the Fair Housing Act, Worth Agency has regularly had vacant dwellings available for rent. Nevertheless, Mrs. Shirley Bessent, a former Worth Agency rental employee from December 1968 to April 1970, testified that when black persons inquired about apartments and none were available at the apartment buildings being rented by blacks, they were told that no apartments were available, that they could submit an application, and would be contacted when an apartment became available.[7] Mrs. Taylor confirmed that this had been the practice,[8] and the testimony of ten black witnesses summarized hereinafter corroborates the existence of this practice.

8. Since passage of the Fair Housing Act, Worth Agency employees have marked many of the applica-

[7] Mrs. Bessent also testified that in some instances blacks were quoted higher rental rates for an apartment than were charged to whites in order to discourage the blacks.

[8] Mrs. Taylor, employed since 1965, stated that the only "change" in this practice was that additional apartments, i.e., St. Charles, St. James, and Mayflower Court, were made available to blacks for the first time in 1971.

tions of black persons with various codes, including "M/S," "M/St," "Mary," and "Mary Street," which stand for Mary Street, the all-black apartment complex. These codes were obviously used to indicate that the applicant was black and did not signify that the applicant had requested an apartment on Mary Street.[9] Approximately a year after this suit was brought, Worth Agency stopped using the "M/S" code and began to fill in an "O" in the letterhead of the application form to identify the applications of blacks.[10]

Both Mrs. Taylor and Mrs. Bessent testified that the racially-coded applications of black persons were kept separately and considered only for those apartment complexes which were made available to blacks.[11]

[9] Susan Shapiro testified that there were numerous applications with these codes in defendants' files. Although Mr. Heil and Mrs. Taylor testified that the words "Mary Street" were written only on the applications of blacks who specifically requested Mary Street, Mrs. Bessent testified that only a few blacks requested Mary Street, but that "Mary Street" may have been written on all black applications. Her recollection is corroborated by (1) a memo in which Mr. Long indicated that "25 Mary Street" was put on the application of a black who did not request Mary Street, and (2) the trial testimony of eight black witnesses that, although "Mary" or "Mary Street" was written on their applications they had not requested any dwelling on Mary Street. (T. T. Perry, Birds, Fields, Jones, Barr, Parker, Smith, Vernon).

[10] Mrs. Taylor testified that in fall 1972, Mr. Heil instructed her to fill in an "O" in the letterhead of the application form to identify the applications of blacks, and that this was done.

[11] Mr. Heil testified that the racial coding of applicaions served no business purpose but was used by him for a per-

As of October 1972, all but one of 212 applications from blacks were filed in folders constituting the waiting lists for three apartment complexes available to blacks, the St. Charles, St. James, and Mayflower Court. Applications of blacks who had not requested a particular complex were placed in waiting lists for these three complexes, while applications from almost all whites who expressed no such preference were placed on other waiting lists for dwellings occupied exclusively by whites. Moreover, as of the fall of 1972, if a black person specifically requested a three-bedroom apartment at all-white Shoreview, his application was placed on the St. Charles or St. James waiting list.

9. Defendant J. C. Long developed a 300-unit federally-assisted apartment project known as Bayside Manor and Gardens. Bayside is located in a predominantly black area of east Charleston near three cemetaries, a junk yard, the Cooper River, and marshland. Since it opened in August 1971, Bayside has been 90% or more black-occupied.

Harry H. Gaston, by deposition, testified that in November 1970, he was employed by J. C. Long; that as part of his efforts to seek tenants for Bayside, he obtained from Worth Agency approximately 80 to 100 applications of persons whose applications were "pending" at the Worth Agency; and a list of

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sonal survey of racial housing patterns. It is nevertheless clear that the racial coding of applications, regardless of its motivations, facilitated the separate handling of applications of blacks and whites.

other persons, all of whom had inquired at Worth Agency but had not rented an apartment there. Mr. Gaston tried to contact these persons to interest them in Bayside. Most of the names thus transferred from Worth Agency to Bayside were black persons, and this is confirmed by defendants' records. (Pl. Ex. #8).

Further, Mr. Gaston testified that he arranged for Mr. Heil to "channel" to him persons who contacted Worth Agency at times when Worth had nothing "available" for them, and that almost all of the persons thus channeled by the Worth Agency to Bayside were blacks.

10. The implementation by defendants of the foregoing discriminatory policies and practices has affected a large number of black persons in the Charleston area. At the trial plaintiff presented the testimony of ten black persons who had inquired about renting dwellings through the Worth Agency. The following is a brief resumé of the testimony of these black witnesses whose testimony was not contradicted and whose credibility was not impeached in any manner by the defendants:

(a) *Joseph A. Grant*, a United States Air Force enlisted man with a rating equivalent to Staff Sergeant, testified that on May 2, 1972, he applied for an apartment through the Worth Agency, filled out an application showing his preference for the west side of the city near Hampton Park, or in Mount Pleasant. He did not request an apartment in the Mary Street

complex. He was told that nothing was available but that he would be contacted if a vacancy arose. During the next few weeks he saw Worth Agency signs on vacant residences in the Hampton Park area. That he was never contacted by or heard anything further from Worth Agency, and he later heard that some other people had rented this apartment through this Agency.

(b) *Hazelline Perry*, the wife of a longshoreman, who holds a BA degree from Benedict College and is a longtime Social Studies school teacher, testified that on June 29, 1970 she applied for an apartment in the northwest area of the city through Worth Agency and filled out an application. She was told there were no vacancies and that she would be contacted when an apartment became available. During the next few weeks she saw Worth Agency newspaper advertisements listing apartment vacancies in the area she desired. She subsequently telephoned the Agency several times to inquire about these apartments, but each time was told that no apartments were available. Later she was contacted by the Agency about an apartment available at Bayside Manor which was not an area in which she desired to live.

(c) *Daniel Birds*, who is employed as a welder at the General Electric Plant, testified that on November 10, 1969, as a result of a newspaper advertisement in the EVENING POST about an apartment for rent through Worth Agency, he filled out an application and was told there was nothing available. He also testified that on June 30, 1971, his wife filled out another application through the Agency but was not able

to rent an apartment at that time. Later they were contacted about an apartment at Bayside Manor which they did not want.

(d) *Talmadge Fields*, a truck driver for Sears, Roebuck and Company, testified that on August 5, 1969, he inquired about an apartment through Worth Agency and was told that there was nothing available and that he would be contacted if anything became available. About two years later the Agency telephoned him twice advising that there was a place available at Bayside Manor and on Mary Street. He did not want to live in either of these areas.

(e) *James Barr*, employed by the Charleston County School District as a seventh grade teacher, testified that on August 18, 1969, he went to Worth Agency, filled out an application for an apartment, and was told there were no vacancies at that time. He was also referred to Rodolph's Real Estate Office, which is a predominantly black rental agency. He was advised that he would be contacted if anything became available. After the filing of his application he continued to see "apartments for rent" ads of the Worth Agency in the newspapers, but in four years he had never been contacted by it.

(f) *Florence Vernon*, a teacher assistant at a kindergarten whose husband is an enlisted man in the United States Navy, testified that on May 16, 1969 she and her husband went to Worth Agency to inquire about a vacant dwelling with a "For Rent" sign on it located on Alberta Street in the Shoreview Subdivision and were told that it was not available. A few days later she saw an ad for a vacancy on Alberta Street through

Worth Agency. She telephoned the Agency and identified herself, but was again told that no dwelling there was available. Plaintiff's Ex. #5 introduced at trial shows that the property about which the Vernons inquired was in fact available at that time.

(g) *Frederick D. Walker*, an aircraft electrician in the United States Air Force, testified that on October 3, 1971, in response to a newspaper advertisement he applied for the rental of a dwelling at Worth Agency. He filled out an application but was told that another application had been accepted for that dwelling. When he inquired about other vacancies he had seen advertised in the same area he was told that there was nothing available.

(h) *Jerome G. Parker, Sr.*, a self-employed auto mechanic, testified that on January 10, 1969, he applied for an apartment and filled out an application at Worth Agency. He was told that nothing was available except on Mary Street, an area in which he did not care to live. He was subsequently contacted about an apartment at Bayside Manor. At an earlier time during 1967, when he had inquired about an apartment at Worth Agency, he was told that the Agency rented only to the military.

(i) *Mrs. Ida Belle Jones*, who is employed at Jones Dry Cleaning Company, testified that on June 28, 1969, she and her husband went to the Worth Agency to apply for an apartment and were told that nothing was available except on Mary Street which they did not want. They subsequently telephoned the Agency several times

and were told each time that the only apartment available was on Mary Street.

(j) *Clarence Smith*, an employee of the Exxon Company, testified that he filled out an application for an apartment at Alberta Street in the Shoreview Subdivision at Worth Agency and was told that nothing was available. He subsequently telephoned on several occasions and was told that no apartment in that area was available.

During the testimony of these ten black witnesses they were shown their original applications filed with Worth Agency which were in evidence. Although the words "Mary" or "Mary Street", or the letters "M/S" or "M/St" (which stand for Mary Street) were written on their applications, they testified that such notation was not in their own handwriting, had not been placed there by them, and that they had not requested an apartment on Mary Street, nor did they desire to live there. In addition, four of these witnesses, who testified that they had been contacted about Bayside Manor, stated that they knew nothing about the Bayside registration card filled out in their names, and that they were not interested in living at Bayside Manor.

Further, these witnesses testified that they each had more than adequate family incomes to afford the rentals of the apartments which they sought to rent.

As already noted, the testimony of these witnesses was not contradicted or impeached by the defendants, and is in fact consistent with the deposition testimony of the defendant Long and the employees of the Worth Agency as to what black applicants

were told, the codes placed on the application forms of blacks, and the referral to Bayside Manor of some of these applications. In addition, the records of defendants introduced in evidence show that at the time of filing of each witness' application at Worth Agency for the rental of a house or an apartment, it had suitable available apartments in the size and price range desired by the witnesses.

11. The record substantiates that prior to the passage of the Fair Housing Act, the Worth Agency engaged in an admitted policy of discrimination in sales. Following passage of the Act, Mr. Long instructed his employees to avoid sales to blacks in white areas, and Mr. Beck, the Worth Agency sales director, testified that he would attempt to do this. The record does not reveal that the defendants have ever sold a dwelling in an all-white neighborhood to a black; and that all sales to blacks, both before and after the enactment of the Fair Housing Act, have been either in neighborhoods changing from white to black (e.g., the Windsor subdivision), or neighborhoods with substantial black populations (e.g., Venning Road area, Garden Hill, Gordon Street, Darlington Avenue).

12. Both before and after the effective date of the Act, Worth Agency advertised properties for sale to "any qualified buyer" which was a phrase apparently used in Charleston to alert readers that the advertised properties were available to blacks, and the phrase was placed in advertisements for only those properties which were made available to blacks

(e.g., Windsor subdivision and Venning Road). Use of the phrase was avoided in advertisements involving the properties to which they did not want to attract blacks.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action and of the parties under 28 U.S.C. § 1345 and 42 U.S.C. § 3613.

2. The houses, apartments, and other residential properties rented and sold by the defendants are "dwellings" within the meaning of 42 U.S.C. § 3602 (b).

3. The Fair Housing Act of 1968, also known as Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601, *et seq.*), which prohibits discrimination in the housing market based on race, color, religion or national origin, is an appropriate and constitutionally permissible exercise of Congressional power under the Thirteenth Amendment to bar all racial discrimination, private as well as public, in the sale and rental of real property. *United States* v. *Hunter*, 459 F.2d 205, 214 (4th Cir. 1972), *cert. den.* 409 U.S. 934 (1972), *reh. den.* 413 U.S. 923 (1973); *United States* v. *Bob Lawrence Realty Co.*, 474 F.2d 115, 119-121 (5th Cir. 1973), *cert. den.* 42 U.S.L.W. 3195 (Oct. 9, 1973). As this court held in denying pretrial motions, 42 U.S.C. § 3613, under which this suit was brought, is not unconstitutionally vague.

4. The Fair Housing Act implements a policy to which Congress has accorded the highest national priority, and it is to be liberally construed in accordance with that purpose. 42 U.S.C. § 3601; *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *United States* v. *Hunter, supra; Mayers* v. *Ridley*, 465 F.2d 630 (D.C. Cir. 1972) (*en banc*). It bars sophisticated as well as simple-minded modes of discrimination, *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939); *United States* v. *Real Estate Development Corporation*, 347 F.Supp. 776, 782 (N.D. Miss. 1972); and prohibits conduct with racially discriminatory consequences, regardless of motivation. *United States* v. *Pelzer Realty Co., Inc.*, 484 F.2d 438 (5th Cir. 1973). *See Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796-797 (4th Cir. 1971) (employment discrimination).

5. Refusal to sell or rent a dwelling to a black person on account of race is not lawful or excusable where it was done for fear of the financial consequences rather than out of prejudiced feelings. *United States* v. *Pelzer Realty Co., Inc., supra.* Just as a school district is not excused from its obligation under the Fourteenth Amendment to provide equal educational opportunity to blacks simply because whites may flee if that obligation is carried out, *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968), so a defendant under the Fair Housing Act may not refuse or discourage sales or rentals by blacks because he fears that whites may flee. *United States*

v. *Reddoch*, P.H. E.O.H. Rptr. Para. 13,569 (S.D. Ala. 1972), *aff'd* 467 F.2d 897 (5th Cir. 1972) (*per curiam*); *United States* v. *Pelzer Realty Co., Inc., supra.*

6. There is no room in the law for "partial" racial discrimination, and the Fair Housing Act is violated whenever race is a significant factor in the unequal treatment of a person seeking to purchase or rent a dwelling. *Smith* v. *Sol D. Adler Realty Co.*, 436 F.2d 344, 349-350 (7th Cir. 1970); *Stevens* v. *Dobs, Inc.*, 483 F.2d 82 (4th Cir. 1973). Accordingly, refusal to rent an apartment to a black person in a white building or area is unlawful, if race placed any part in that refusal; and this is true even where legitimate nonracial reasons also exist for the refusal to rent. *United States* v. *Pelzer Realty Co., Inc., supra.* Specifically, it is a violation of the Fair Housing Act to check the credit or other qualifications of blacks seeking to live in white buildings more strictly than those of white persons seeking to do so, and then to disqualify the blacks on the basis of information elicited from that discriminatorily intensive check. *Hall* v. *Freitas*, 343 F.Supp. 1099, 1101 (N.D. Calif. 1972); *United States* v. *Pelzer Realty Co., Inc., supra; United States* v. *Reddoch, supra.*

7. 42 U.S.C. § 3604(a) makes it unlawful to refuse to sell or rent a dwelling, or otherwise to make a dwelling unavailable to or deny a dwelling, to any person on account of race. This provision is very broad and reaches every practice which has the effect of making housing more difficult to obtain on account

of race. The defendants' policy of discouraging blacks from living in white buildings and areas, and of conducting a concentrated search for "nonracial" disqualifications where blacks insist on their right to desegregated housing, makes dwellings unavailable on account of race, in violation of 42 U.S.C. § 3604(a). *United States* v. *Reddoch, supra.*

8. 42 U.S.C. § 3604(b) makes it unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling because of race or color. Defendants' imposition of security deposits at apartment buildings available for rent to blacks, but not at all the apartment buildings occupied by whites; and defendants' practice of checking the credit of most blacks, but not most whites, violates 42 U.S.C. § 3604(b). Such practices also have the effect of making dwellings unavailable because of race in violation of 42 U.S.C. § 3604(a). *United States* v. *Pelzer Realty Co., Inc., supra; United States* v. *West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971).

9. The defendants' practice of considering blacks only for dwellings in predominantly black apartment buildings and subdivisions, while considering whites for dwellings in white areas, "steers" or "channels" prospects along racial lines and makes dwellings unavailable on account of race and color in violation of 42 U.S.C. § 3604(a).

10. 42 U.S.C. § 3604(c) makes it unlawful, among other things, to make any statement with respect to the sale or rental of a dwelling which indicates any

discrimination, limitation or preference based on race. *See United States* v. *Hunter, supra; Mayers* v. *Ridley, supra.* Since this statute deals with speech only in a commercial context, it is consistent with the First Amendment. *United States* v. *Hunter, supra.* Defendants' admitted policy of attempting to talk blacks out of living in white buildings and areas, and of encouraging them to live in black or transitional areas or complexes violates 42 U.S.C. § 3604(c). *Cf. United States* v. *Pelzer Realty Co., Inc., supra.* In addition, the selective use in real estate advertisements of locally accepted words or phrases which imply or suggest race or color is presumptively illegal under the "Advertising Guidelines For Fair Housing" issued by the Secretary of Housing and Urban Development, 37 F.R. 6700 (April 1, 1972), and that construction is entitled to great weight. Defendants' selective use of the phrase "any qualified buyer" to attract black prospects to certain properties violates 42 U.S.C. § 3604(c).

11. 42 U.S.C. § 3604(d) makes it unlawful to represent to any person on account of race that a dwelling is not available for inspection, sale or rental, when it is in fact available. *See United States* v. *Reddoch, supra.* Defendants' admitted representations to black applicants that they had no apartments available when, in fact, apartments were available in "white" buildings, violate 42 U.S.C. § 3604(d).

12. To prevail on the merits in this case, the United States must show that the defendants have either:

A. engaged in a "pattern or practice" of resistance to the full enjoyment of the right to equal housing opportunity; or

B. denied rights granted by the Fair Housing Act to a group of persons, and the Attorney General has determined that such denial raises an issue of general public importance. 42 U.S.C. § 3613. *See United States* v. *Bob Lawrence Realty, Inc., supra,* 474 F.2d at 122-123, and cases there cited.

13. To prove a "pattern or practice" of discrimination, the plaintiff must show that any discriminatory conduct by the defendants was not an isolated, accidental, or peculiar departure from otherwise nondiscriminatory practices. *United States* v. *Pelzer Realty Co., Inc., supra; United States* v. *Reddoch, supra; United States* v. *Real Estate Development Corp., supra,* 347 F.Supp. at 783; *United States* v. *Grooms,* 348 F.Supp. 1130, 1133 (M.D. Fla. 1972).

14. Extrajudicial admissions of a racially discriminatory policy are, standing alone, persuasive evidence of a "pattern or practice." *United States* v. *Reddoch, supra; United States* v. *Real Estate Development Corp., supra,* 347 F.Supp. at 783. Testimonial admissions by a defendant that blacks are discouraged from living in white buildings are even more persuasive. Instructions to employees to discriminate in various ways against black persons in order to discourage or prevent them from moving into all-white apartment buildings support a finding of a pattern or practice of discrimination.

15. If a defendant is shown to have a policy of treating blacks differently from whites in relation to their housing opportunities, that satisfies the pattern or practice requirements of 42 U.S.C. § 3613, without the necessity for plaintiff to prove the specifics of every instance in which such policy has been implemented. *United States* v. *Reddoch, supra, United States* v. *Real Estate Development Corp., supra.* Isolated or infrequent refusals to sell or rent is sufficient to show a pattern or practice, when combined with extrajudicial and testimonial admissions of a discriminatory policy. In this case, the testimony of ten black rental applicants and the documentary evidence substantiate that large numbers of black applicants were designated for black buildings without their requesting to live there, and this satisfies the pattern and practice requirements.[12] Although the proof in this case supports the conclusion that the defendants constantly engaged in unlawful discriminatory conduct, such a showing is not indispensible to a finding of pattern or practice. *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 552 (9th Cir. 1971); *United States* v. *Reddoch, supra; United States* v. *Real Estate Development Corp., supra,* 347 F.Supp. at 783-784.

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[12] Defendants' applications and the other documents introduced in evidence by plaintiff give rise to a strong inference and forms a sound basis for a factual assumption that many blacks, other than those who testified at trial, were victims of housing discrimination because of their race.

Further, while the defendants were not legally obligated to sign assurances of nondiscrimination with the Department of Defense, the defendants' refusal to do so projected a racially discriminatory image. Such refusal, like Roper Hospital's refusal to participate in federal programs requiring nondiscrimination, *United States* v. *Medical Society of South Carolina*, 298 F.Supp. 145 (D. S.C. 1969), is additional evidence of a pattern or practice of discrimination, *United States* v. *Real Estate Development Corp.*, *supra*, and raises an issue of general public importance so as to give the Attorney General clear authority under Section 3613 of the Act to prosecute this action. *United States* v. *Hunter*, *supra*. The Attorney General's determination as to an issue of general public importance is conclusive and not subject to judicial review. *United States* v. *Northside Realty Associates*, 474 F.2d 1164 (5th Cir. 1973); *United States* v. *Bob Lawrence Realty, Inc.*, *supra*, 474 F.2d 125, n. 14. Proof that blacks as a group have been treated differently from whites with respect to their housing opportunities satisfies the "issue of general public importance" of Section 3613, even though the identity of the victims of discrimination may be unknown to the Attorney General at the time of the commencement of the action. *United States* v. *Hunter*, *supra*; *United States* v. *Real Estate Development Corp.*, *supra*.

16. Evidence of pre-Act discriminatory policies and practices is admissible to show motive, intent, and the true character of post-Act policies and practices.

United States v. *Northside Realty Associates, Inc.*, C.A. No. 13932 (N.D. Ga. September 27, 1973), *on remand*, 474 F.2d 1164 (5th Cir. 1973); *United States* v. *International Association of Bridge, Structural and Ornamental Ironworkers, Local No. 1*, 438 F.2d 679, 683 (7th Cir. 1971); *United States* v. *Building and Construction Trades Council of St. Louis, Mo.*, 271 F.Supp. 454-459 (E.D. Mo. 1966). Where, as here, the defendants admit a pre-Act policy of discrimination, and little or no evidence of a post-Act change has been adduced, a strong inference arises that the pre-Act policy continued after the effective date of the Act. *United States* v. *West Peachtree Tenth Corp.*, *supra*, 437 F.2d at 227 and the cases there cited; *United States* v. *Real Estate Development Corp.*, *supra*, 347 F.Supp. at 784.

17. The right of the United States to relief under 42 U.S.C. § 3613 is further supported by the statistical records in evidence, which show that eleven rental complexes or subdivisions operated by defendants have always been virtually all white in spite of the large number of black applicants eligible to live in them. *United States* v. *Real Estate Development Corp.*, *supra*. The impact of this statistical evidence is further bolstered by the racial coding of records, *Avery* v. *Georgia*, 345 U.S. 559, 562 (1953); *United States* v. *West Peachtree Tenth Corp.*, *supra*, 437 F.2d at 224; and by the absence of objective rental standards and procedures. *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972), *cert. den.* 409 U.S. 982 (1972).

18. The Fair Housing Act requires that persons who have actual control over sale or rental policies exercise that control in such a manner as to assure equal housing opportunity; they cannot escape that obligation by "delegating it away." *United States* v. *Real Estate Development Corp.*, 347 F.Supp. at 784. In *United States* v. *Reddoch*, 467 F.2d 897 (5th Cir. 1972), the court affirmed a holding that even silent partners are liable for the discriminatory conduct of a resident manager. In the instant case the defendant Long, the owner and dominant principal figure in most of the apartment complexes involved and in the Worth Agency, failed to instruct his agents and employees to treat all applicants alike, whether black or white. To the contrary he suggested various means of keeping blacks away from white areas. Further, he failed to instruct and advise his agents and employees concerning the provisions of the Fair Housing Act. Neither did he exercise proper control over his agents and employees in reference to the Act's requirements, with the effect that housing was made unavailable to a host of applicants because of their race.

19. In cases such as this where the plaintiff has sufficiently proved a pattern or practice of racial discrimination in housing, ". . . the court has not merely the power, but the duty, to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *United States* v.

Hunter, 459 F.2d at footnote 21; *United States* v. *Medical Society of South Carolina, supra*, 298 F.Supp. at 152-153.

20. Based upon the foregoing findings it is concluded that plaintiff is clearly entitled to injunctive relief which:

> (a) prohibits all conduct by the defendants, including their employees, agents, officers, successors, and all persons acting in concert with any of them, which denies equal housing opportunity to any person because of race and color. Moreover, while the injunction should be so phrased as to cause the minimum disruption to defendants' business compatible with equal housing opportunity, *United States* v. *West Peachtree Tenth Corp., supra*, it must realistically assure the full enjoyment of such equal opportunity.

(b) requires the defendants to adopt and implement written, objective, nonracial standards and procedures for receiving, processing, and approving applications, so that blacks will have the same practical opportunity as white persons to rent dwellings. These standards should be no more stringent than those previously applied to whites, and should not depend on the subjective feelings of the defendants or their agents. *United States* v. *Reddoch, supra; United States* v. *Real Estate Development Corp., supra.*

(c) requires the defendants to take affirmative steps to correct the effects of their discriminatory image, and assure equal housing opportunity in the future. These steps include notification to the public of their nondiscriminatory policy, appropriate instructions and training

program for agents and employees, and a requirement for the filing of periodic reports with the court in order to effectuate the Decree. *United States* v. *West Peachtree Tenth Corp., supra,* 467 F.2d at 898; *United States* v. *Medical Society of South Carolina, supra,* 298 F.Supp. at 155, 157-158.

21. 42 U.S.C. § 3613 authorizes the Attorney General to seek such orders against persons responsible for denials of equal housing opportunity "as he deems necessary to insure the full enjoyment of the rights granted by this subtitle." Black persons who through defendants' discriminatory acts have been denied the opportunity to reside in defendants' white properties cannot secure the "full enjoyment" of their rights unless they are restored to their rightful place. Realistically, those who have been discriminated against should in proper cases be awarded reasonable monetary relief in keeping with the damages they have suffered as a result of any discriminatory practices imposed upon them.

The court recognizes that no contested district or appeals court case has been cited to it, nor has it been able to find any case from its own research, in which monetary relief has been awarded to individuals in housing discrimination suits brought by the Attorney General under Section 3613. However, several district courts have approved consent decrees which provide for monetary compensation for victims of discrimination in such cases. *United States* v. *Lakratt Corp.*, Civil No. 69-1662 (E.D. La. 1969);

United States v. *Magnolia Manor, Inc., et al.*, Civil No. 4681 (S.D. Miss. 1971); *United States* v. *Goldberg*, Civil No. 70-1223-Civ-PTF (S.D. Fla. 1972); *United States* v. *Moore*, Civil No. 1172 (S.D. Ga. 1973). In *United States* v. *Colonial Village, Inc.*, Civil No. 252-73-A (E.D. Va. Oct. 26, 1973) the court entered a consent decree requiring defendants to offer $250 each to cover 30 Asians who were allegedly the victims of discrimination. *See also United States* v. *West Peachtree Tenth Corp.*, 437 F.2d 221, in which the Fifth Circuit, although not passing upon the specific issue of monetary relief in a Section 3613 case, held that the federal courts are fully empowered to eliminate the present effects of past discrimination by awarding affirmative relief in addition to an injunction. At page 228, the court stated:

> "Appellee's argument that the Court is limited to issuing an injunction in granting relief under 42 U.S.C.A. § 3613 is without merit. In Alabama v. United States, 5 Cir. 1962, 304 F.2d 583, aff'd. 371 U.S. 37, 83 S.Ct. 145, 9 L.Ed.2d 112, a suit under the Civil Rights Act of 1960, 42 U.S.C.A. § 1971 et seq., the defendant raised the same argument with reference to a provision of that Act which provided for 'a permanent or temporary injunction, restraining order, *or other order.*' 42 U.S.C.A. § 1971(c) (emphasis added). The portion of § 3613 which appellee here seeks to limit is identical in wording. In *Alabama*, this Court held that the phrase 'or other order' includes the power to grant affirmative relief. Id. at 590. Indeed, the federal courts are fully em-

powered to eliminate the present effects of past discrimination."

Also, monetary relief has been awarded to individuals in employment discrimination suits brought by the United States as plaintiff. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *United States* v. *Wood, Wire & Metal Lathers, Int. Union, Local Union 46*, 328 F.Supp. 429 (S.D. N.Y. 1971), *aff'd.* 471 F.2d 408 (2d Cir. 1973), *cert. den.* 412 U.S. 939; *United States* v. *Lee Way Motor Freight, Inc.*, Civil No. 72-445 (W.D. Okla. August 27, 1973); *Stamps* v. *Detroit Edison Co.*, 365 F.Supp. 87 (E.D. Mich. 1973). It would appear just and equitable that compensation for victims of discrimination in housing suits brought under Section 3613 should be just as appropriately awarded by a court of equity as the awarding of back pay to individual victims of discrimination in an employment discrimination suit brought by the Attorney General.

In this connection the court is not convinced by defendants' argument that monetary relief should not be awarded in this and other Section 3613 cases because victims of housing discrimination have their own individual causes of action under Section 3612 of the Act.[13] This same contention was asserted be-

[13] Defendants further contend that such victims of racial discrimination also have a cause of action under an old Civil Rights Act, 42 U.S.C. § 1982.

fore the courts of appeal in the *Georgia Power* and the *Wood, Wire & Metal Lathers* cases, *supra.*[14]

22. In the present case, the defendants' records reflect that a great number of black applicants for rental housing were not given proper consideration by the defendants for residence in white buildings. Thus, it is not practicable for the court with its work-

[14] In the *Wood, Wire & Metal Lathers* case, 328 F.Supp. 429, at page 441, Judge Frankel, in allowing compensatory back pay to blacks in an employment discrimination suit brought by the United States pursuant to Title 7 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, stated:

> "The controlling statute provides that in suits like this one, brought by him in the name of the United States, the Attorney General may seek 'such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.'"

This statutory provision is strikingly similar to that used by Congress in the Fair Housing Act of 1968. In Note 14 at page 441, Judge Frankel further observed:

> "The broad remedial powers of the court under the Title here in question seem sufficient to achieve the patently sensible remedy of repairing the forbidden monetary injury. The Title as a whole contemplates complementary rights of suit by the individual, aided by the Government where necessary and by the Government directly. Without laboring the subject, the separation defendant proposes between the class of those to be protected and the Government as protector seems artificial and pointless."

Judge Frankel's decision was affirmed by the 2nd Circuit in 471 F.2d 408.

load and heavy schedule to have each alleged victim of discrimination brought before it for hearing. Under similar circumstances, other district courts have appointed Special Masters to consider individual claims for monetary relief in ancillary proceedings. *United States* v. *Lee Way Motor Freight, Inc., supra; Stamps* v. *Detroit Edison Co., supra; United States* v. *Wood, Wire & Metal Lathers, supra.* The Special Master may consider the claims for damages of persons not called as witnesses in the main proceeding, as well as the claims of those who were called to testify. *United States* v. *Lee Way Motor Freight, Inc., supra.*

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law:

I

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant, J. C. Long, and the defendant, Worth Agency, their agents, employees and all persons acting in concert or participation with either of them, be, and each is hereby permanently enjoined from:

a. Representing to any person, directly or by implication, because of race, color, religion or national origin, that any dwelling is not available for inspection, sale or rental when such dwelling is in fact available.

b. Refusing or failing to provide or offer information about a dwelling or to show, sell, or rent a

dwelling to any person because of race, color, religion or national origin.[15]

c. Making unavailable or denying a dwelling to any person because of race, color, religion or national origin.

d. Discriminating against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the furnishing of information, services, or facilities in connection therewith because of race, color, religion or national origin.

e. Making, printing, or publishing, or causing to be made, printed or published, any notice, statement or advertisement with respect to the sale or rental of a dwelling that indicates any pereference, limitation, or discrimination based on race, color, religion or national origin.

f. Steering or channeling any prospective tenant or purchaser toward residence in any particular dwelling or neighborhood because of race, color, religion or national origin.

II

IT IS FURTHER ORDERED that the defendants shall:[16]

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[15] The Complaint does not allege discrimination based on religion or national origin. This Order nevertheless forbids all violations of the Fair Housing Act.

[16] The defendants' obligation to implement each provision of this Order for affirmative action shall begin sixty (60) days following the entry of this Order, unless otherwise specified herein.

a. Adopt and implement nonracial standards for receiving, processing, evaluating, and approving applications for rental and sale of dwellings (hereinafter referred to as Rental and Sales Standards). These Rental and Sale Standards shall be reasonably objective, based on past white standards, and may be changed in accordance with the spirit and letter of this Order with a copy of any such change being sent to plaintiff as soon as changed.

b. Post and maintain in a prominent place in the front office at the Worth Agency, 90 Broad Street, Charleston, S. C., a bill or poster board, which shall be captioned in one-inch block letters, reading "Available Rental Properties." Attached to the board shall be a list which shall contain the following information:

(1) The address of all the available rental property.

(2) Designation of the type of rental property such as: size of the rental unit, first floor apartment, second floor apartment, single family residence, townhouse type apartment.

(3) The term of the lease desired.

(4) The monthly rental required.

(5) What appliances, if any, are included in the rental.

(6) Whether maintenance of appliances is included in the rental.

(7) The required security deposits.

(8) Whether rental includes artificial light, heat or water.

(9) Other pertinent information, such as date on which a new tenant may occupy dwelling.

c. Continue to use their current rental application form, a copy of which is Attachment I to this Order. The agents of the defendants shall assist applicants, as needed, in completing applications, and shall note race of applicant and of his spouse, if present. All credit or other checks of the qualification of applicants shall be uniform and without regard to race, color, religion or national origin.

d. Within ten days after any application is filed with the defendants, they shall notify the applicant whether his application has been accepted or rejected, and, if rejected, shall return with such notice any deposit, if any was required.

III

a. All present and future agents and employees, who deal in residential real estate activities for defendants, shall be given a copy of this Order, and, as appropriate, a copy of Rental and Sales Procedures and they shall be instructed to follow same at all times.

b. A signed statement from each such agent and employee that he or she has read this Order and the Rental Standards, as appropriate, shall be obtained within ten (10) days of the entry of this Order; and, in the case of future employees, within ten (10) days of his employment.

IV

The defendants shall take the following steps:

a. A Fair Housing sign in the form attached as Attachment II shall be prominently displayed in a place clearly visible to all persons in, or immediately outside, each office of the defendants where there is sale or rental activity. The sign shall be in accordance with the Department of Housing and Urban Development "Fair Housing Poster" regulations, 37 Fed. Reg. 3429-3430 (February 6, 1972), a copy of which is appended as Attachment III to this Order.

b. All advertising and promotional materials of any nature whatsoever, in newspapers, telephone directories, billboards, pamphlets and other media, of properties of J. C. Long and Worth Agency shall include the HUD "Equal Housing Opportunities" logotype and slogan prominently placed and easily legible.

c. Notify, in writing, the Housing Referral Officer at the Charleston Naval Station, Charleston, South Carolina of (1) the name and location of all apartment buildings, complexes, or subdivisions available for rental through the defendants and (2) that all dwellings available for sale or rental through the defendants are available without regard to race, color, religion or national origin.

V

Six months after the entry of this Order, and every six months thereafter for two years, defendants shall

send to counsel for plaintiff, a report containing the following information:

a. A description of all affirmative steps taken pursuant to this Order, with copies of pertinent notices and other written materials.

b. A copy of each application for an apartment, and credit check if secured during the reporting period, with a notation of the race of the applicant (if visually ascertainable), the action taken on the application, and the reason for rejection, if any. Credit checks, if made, shall be obtained on a racially non-discriminatory basis.

c. Copies of vacancy lists for each complex posted during the reporting period.

d. Occupancy of units, by race, if ascertainable, at each of defendants' rental complexes as of the end of each reporting period.

e. The name, address of dwelling sold, and race (if visually ascertainable) of every purchaser of a dwelling sold by defendants during the reporting period.[17]

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[17] During the trial the court conferred at length with counsel for the parties, even recessing the trial for a day, in an attempt to resolve all the issues in this case by means of a consent Order. The court was advised that counsel and the parties substantially agreed to most of the provisions of this Order contained in paragraphs I through V hereinabove, which grants injunctive and other affirmative relief against the defendants; but that the parties were unable to agree upon what further relief, including monetary damages, should be granted to the individuals who established that they had been victims of discrimination at the hands of the defendants. Thus the trial proceeded to a conclusion on the merits.

VI [18]

IT IS FURTHER ORDERED that, to provide appropriate relief, including monetary damages, to persons who are able to prove that they have been discriminated against by the defendants, the following steps shall be taken:

a. Plaintiff may prepare a list of those persons it believes to have been the victims of discrimination at the hands of the defendants. For purposes of compiling this list, plaintiff shall have the right to inspect and copy the pertinent records of the defendants, provided that plaintiff's representatives shall use reasonable efforts to minimize any inconvenience to the defendants.

b. Within sixty (60) days after all appeals of this Order have been finally determined, plaintiff may notify the persons on its list that they may have been victims of discrimination; and pursuant to the Order of this court in this action:

(1) that they have the right to renew their application for an apartment by contacting the Worth Agency, provided they do so within sixty (60) days of the receipt by them of such notice; and that if they meet the rental standards applicable to all tenants, they will be given priority for any then available dwelling or apartment of their choice; and that the Worth Agency will pay their reasonable moving expenses within a fifty (50) mile radius of the City of Charleston; *or*

(2) that they have the right to submit to the court and attempt to establish a claim for monetary compensation for racial discrimination on the part of the defendants to be heard by a Special Master, provided that they notify the plaintiff in writing of their intention in this regard within sixty (60) days of receipt of such notice; *or*

(3) that they may have a right to proceed under two federal statutes, the Civil Rights Act of 1866, 42 U.S.C. § 1982, and/or the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*; and that they may retain their own attorney, or that the court upon a proper showing may appoint an attorney for them; and that upon proper proof of racial discrimination toward them by defendants, they may recover damages from the defendants by court action.

c. If this portion of the within Order is affirmed on appeal the court will then appoint a Special Master pursuant to Rule 53 of the Federal Rules of Civil Procedure to hear any claims of racial discrimination filed by persons acting pursuant to the procedures set forth herein. The Master will conduct such hearings as may be necessary and make findings with regard to each claim, and will, where appropriate, recommend to the court that it award an amount of monetary damages to be paid to such claimant by defendants.

[18] It is specifically understood that the implementation of the provisions of Section VI of this Order is stayed until such time as *all* appeals from this Order have been finally and fully resolved.

d. If either party objects to any finding or award recommended by the Master, such party may within ten (10) days of the filing of the Master's Report except to it before this court by filing his notice with the Clerk.

VII

In view of the lack of controlling precedent, the court has doubt as to whether monetary relief to individuals should be allowed under a Section 3613 proceeding by the Attorney General such as this case. The court further strongly feels that this Order, providing for the allowance of such monetary relief to individual victims of discrimination under Section 3613, involves legal questions of first impression, and presents serious questions of law concerning which there are substantial differences of opinion; and that an immediate appeal from this portion of the Order will materially advance the ultimate disposition of this litigation by affording resolution of these questions. These questions of law are:

(1) Whether, in a suit brought by the Attorney General under Section 3613 of the Act, affirmative relief in the form of monetary damages, may be awarded to the individual victims of discrimination; and,

(2) If so, whether defendants are entitled to a jury trial on the issue of such monetary relief.[19]

[19] It is noted that there is now pending before the United States Supreme Court the case of *Rogers* v. *Loether*, 467 F.2d 1110 (7th Cir. 1972), *cert. granted* 412 U.S. 937 (1973), argued Dec. 4-5, 1973 (42 U.S.L.W. 3350), which involves the issue of whether a party to a suit brought under Section 3612 for damages and relief because of discrimination under the Fair Housing Act is entitled to a jury trial. Before trial defendants moved the court to stay the proceedings in this case pending the Supreme Court's decision in that case. This motion was overruled because the court was of the opinion that a decision concerning the right of a jury trial in a Section 3612 case where an individual seeks damages only would not be determinative of the jury trial issue in a Section 3613 case brought by the Attorney General seeking primarily equitable relief.

Inasmuch as the record before the court indicates that the claims of many persons for individual relief may be presented in this case, an immediate appeal and resolution of these issues are needed before the time and expense of the notice and proceedings before the Special Master as set up in paragraph VI herein are incurred by the parties.

Section VI of this Order and the foregoing issues are hereby certified for an early appeal pursuant to the provisions of 28 U.S.C. § 1292(b). Should defendant's [*sic*] petition the Court of Appeals for the Fourth Circuit, as they have indicated their desire to do, and that Court allows such petition, then the implementation of the requirements of Paragraph VI of this Order shall be stayed until such time as all appeals have been finally determined by the Fourth Circuit, and also by the United States Supreme Court, if the appeal proceeds to the latter court.

VIII

Upon reasonable notice of not less than one week to counsel for defendants, representatives of the United States shall have the right to inspect and copy defendants' documents and records relating to the sale or rental of dwellings. In the absence of specific evidence of discrimination, such inspection and copying shall not be done more than once in any six month period. Plaintiff is directed to conduct such inspection in such a manner as to minimize any inconvenience to defendants. If counsel for the parties are unable to resolve their differences in this regard, after a good faith effort to do so has been made, then either party may apply to the court for relief from any abuse of this provision, which application shall be supported by Affidavit of counsel.

IX

IT IS FURTHER ORDERED THAT:

a. In the event of a dispute under this Order, either of the parties may apply to the court for direction and resolution of such dispute, upon giving of reasonable notice to the other party, provided that counsel for the parties have made a bona fide effort for at least 30 days to resolve their differences, and, provided further, that such application is supported by Affidavit of counsel.

b. The defendants' keeping of racial records for the purpose of complying with this Order shall not be considered discriminatory.

c. This Order in no way shall be interpreted as determining the validity of any claims, monetary or otherwise, that have existed or may exist in the future between the defendants and any other persons or organizations other than the United States under the Fair Housing Act of 1968. Specifically, it is not the purpose of this Order to determine the rights of any individuals, including those persons who testified for plaintiff in this case, to monetary relief. If such persons desire to seek monetary relief from the defendants, they must file and establish their claims as herein provided before the Special Master to be appointed. The factual findings hereinabove set forth were made primarily for the purpose of supporting the injunctive relief herein granted against the defendants enjoining any future violations of said Fair Housing Act.

d. The plaintiff shall recover of the defendants its taxable costs; provided that the costs of the proceedings, if any, before the Special Master, including the Master's fee, and reporter's fee, and all other costs incurred in connection with any individual's claim for monetary relief, shall be shared equally by both parties.

e. The court retains jurisdiction of this action for all purposes.

AND IT IS SO ORDERED.

/s/ Charles E. Simons, Jr.
CHARLES E. SIMONS, JR.
United States District Judge

Aiken, South Carolina
January 14, 1974.

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Supreme Court of The United States

October Term, 1975

No. 75-1920

UNITED STATES OF AMERICA, *Petitioner,*

versus

J. C. LONG, ET AL., *Respondents,*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Neither the opinion of the court of appeals (Appellant's brief, App. A, pp. la-12a) nor the opinion of the district court (Appellant's brief, App. D, pp. 16a-60a) is officially reported; however, both are partially reported unofficially.

JURISDICTION

The Respondents have no objection to the jurisdiction of this court.

QUESTION PRESENTED

Whether Section 813 of the Fair Housing Act permits the Attorney General to seek and recover monetary damages.

STATUTORY PROVISIONS INVOLVED

The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 82 Stat. 81 *et seq.*, provides in relevant part:

Section 812, 82 Stat. 88, 42 U.S.C. 3612, entitled "Enforcement by private persons:"

> (a) • • • The rights granted by section 3603, 3604, 3605 and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. • • •
>
> • • • • •
>
> (c) • • • The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees, in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Section 813, Stat. 88, 42 U.S.C. 3613:

> Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT OF THE CASE

On December 27, 1971, the Attorney General filed his Complaint herein pursuant to Section 813 of the Fair Housing Act seeking only injunctive relief. The case was placed (and remained) on the civil, non-jury calendar. Not until September 12, 1973 did the Attorney General indicate he would seek money damages.[1] Timely motions for a jury trial and a directed verdict as to the unavailability of money damages under Section 813 were denied by the trial court. The issue of liability (*i.e.*,whether Respondent had in fact violated Section 804) was tried by the court, and it ruled in Appellant's favor on January 14, 1974.

The district court held that compensatory damages were recoverable, apparently in unlimited amounts, without jury trials, by third persons, not parties to the action, on a complaint brought by the United States which prayed solely for injunctive relief under a statute which provides only for equitable relief.

The following questions of first impression gave the district court doubt, and were certified to the United States court of appeals for the fourth circuit:

> (1) Whether, in a suit brought by the Attorney General under Section 813 of the Act, affirmative relief in the form of monetary damages, may be awarded to the individual victims of discrimination; and,

[1] Answer to Respondent's Interrogatory No. 89: "Plaintiff states that appropriate relief in this case should include provisions for putting the victims of past discriminatory practices in their rightful place and making them whole by, among other things, compensating them for the damages they have suffered as a result of the Defendant's past discriminatory practices." Possibly, Rogers v. Loether, 467 F. 2d 1110 (C.A.7th 1972) spawned the government's belated intent to seek damages *without* a jury trial.

> (2) If so, whether Defendants are entitled to a jury trial on the issue of monetary relief.[2]

The court of appeals, on October 28, 1975, reversed the portion of the district court order which had provided for money damage recoveries by individuals in actions by the Attorney General under Section 813.[3] Because it was unnecessary to its decision, the Seventh Amendment jury trial issue was not addressed by the court of appeals.

REASONS FOR DENYING THE PETITION

INTRODUCTION

The exceedingly lengthy injunctive order[4] issued by the district court two and a half years ago has been strictly adhered to without the first whisper of dissatisfaction by the public, the Respondent, the district court, or the United States. Moreover, the racial composition of the apartments involved bears not the slightest resemblance to the picture

[2] The district court decided that "[t]hose who have been discriminated against should in proper cases be awarded reasonable monetary relief in keeping with the damages they have suffered as a result of any discriminatory practices imposed upon them." The premise by the district court, urged here by Appellant and rejected by the court of appeals, was that back-pay recoveries in Title VII actions by the United States are possible; therefore, damages, being likewise "monetary", ought be recoverable in Title VIII actions by the United States.

[3] Appellant's petition for re-hearing was denied by the court of appeals on February 5, 1976; it did, however, revise its initial opinion to provide, on remand, that the district court determine whether equitable restitution would be appropriate here (*e.g.*, return of any discriminatory deposits or over-charges). If so, that equitable relief was held to be available.

[4] The order imposed a wide-ranging injunction upon Respondents including adoption of non-racial sales and rental standards, posting of notices of all available housing, procedures regarding rental applications, instructions to and statements from agents and employees, Fair Housing display signs, Fair Housing logo on all advertising, notices to the Naval Housing Officer, and extensive and frequent reporting requirements to the Justice Department for two years.

of a few years ago.

This is one practical answer to Appellant's ungrounded claim that the court of appeals' decision reduces Section 813 effectiveness.[5]

By far the clearest and most fundamental response, however, is that there is not one word or phrase within Section 813 to indicate legislative intent to provide for money damages in actions brought by the United States. In order to fault the opinion of the court of appeals, one must accept the implausible notion that Congress changed signals between the time it drafted Section 812 and Section 813. Appellant beseeches this Court to accept the proposition that Congress, while expressly providing for damages, amount limits, and a statute of limitation in Section 812, meant for the same recovery to be available under Section 813 by *not* using any of those terms.[6]

We shall provide this Court with our reasoning as to why a writ of certiorari should not issue by dividing our argument into two sections. Initially, we will respond to Appellant's suggestions, and then conclude by exploring more fully the foundation for the court of appeals' decision.

---

[5] In the five years of enforcement preceding the district court order herein, the government has made no showing that its efforts were ineffective even though there was no precedent for recovery of damages under Section 813.

[6] It should also be noted that Appellants wish Section 813 to be construed so as to selectively incorporate the provisions of Section 812. Thus, as the Appellants argued in the fourth circuit, Section 813 should be read to include Section 812's rights to recover monetary damages but should not be interpreted to include the statute of limitations expressly set forth in Section 812 nor the right to a trial by jury.

I.

APPELLANT'S POLICY ARGUMENTS AND STATUTORY CONSTRUCTION EFFORTS ARE ERRONEOUS AND UNPERSUASIVE GROUNDS FOR ISSUANCE OF A WRIT OF CERTIORARI

The three grounds offered in Appellant's petition for a writ may be easily distilled. The first deals with ostensible policy reasons as to why Section 813 damage recoveries are vital to effective public enforcement. The latter two concern Appellant's suggested statutory construction. Respondent's rebuttal will appear just after each of Appellant's three points. The first ground Appellant offers is as follows:

> 1. Section 813 actions involve situations where individual lawsuits are neither "desirable" nor "practicable". Moreover, the effectiveness of Section 813 actions depends largely on monetary damages [citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)]. However, the court of appeals' decision (a) leaves real estate owners little incentive to obey the law so that (b) damages suffered will go uncompensated, and (c) Appellants efforts to enforce the law will be impeded. On this account, and due to a "conflict among the district courts" regarding Section 813 damage recoveries, a writ should issue.

Legislative debate provides the most appropriate forum for advocating the addition of language to a statute which was, we must assume, deliberately excluded from it. Certainly there can be no quarrel from Appellant that Congress could have as effortlessly provided for damages in Section 813 as it did in Section 812. Since it did not do so, we believe it extremely unlikely that Congress intended the construction requested by Appellant.

The danger accompanying questions of "practicability" is that it invites judicial interference with legislative decisions. Nevertheless, Appellant's premises regarding "practicability" are vulnerable. The monetary advantages [unlimited actual damages, punitive damages up to $1,000.00, attorneys fees, free court costs, no security requirements] and options [conciliation or suit for injunctive and monetary relief under Section 812; suit for injunction or damages under 42 U.S.C. §1982] afforded private litigants have induced countless, successful conciliation agreements and lawsuits for housing discrimination.[7]

Appellant is on even less firm ground in suggesting that monetary damages are the key to effective prosecution by the United States under Section 813. Prior to the district court decision herein, we are aware of few contested cases lost by Appellant. Given its experience and sizable legal and paralegal staff together with the investigative resources of the F.B.I., there is rarely an opportunity for discriminatory conduct to go undetected. Once a trial is had and an injunctive order entered, there are few litigants foolish enough to risk a contempt order.

Another forceful indication that damages are not the cornerstone to effective Section 813 actions is the reality that the Appellant never sought damages in the five years of litigation prior to this case; and, if Appellant really felt

[7] *See, e.g.*, two recent cases, Harper v. Reap Realty, No. C-75-70, (N.D. Ohio, decided Feb. 6, 1976), $10,000. verdict and $5,000. attorney fees for racial refusal to negotiate home rental; Clemons v. Runck, P-H E.O.H. REP., §13,734 (S.D. Ohio, No. C-1-74-166, decided Nov. 3, 1976), $4,500. actual and punitive damages, $5,500. attorney fees for racial refusal to sell lot; *see also*, the examples of types of recoveries cited by the court of appeals, App. A, Appellant's petition, page 8a, n. 8.

damages to be essential and recoverable, one wonders why it never prayed for damages in this or prior Section 813 actions.[8]

Appellant closes point one with reference to what is an illusory "conflict among the district courts".[9] Of the four cases cited by Appellant for the proposition that damages are available in Section 813 actions, two (*West Suburban* and *Hilton-Sykes*) were decided before the fourth circuit court of appeals' decision, and relied exclusively for Title VIII precedent on the district court decision herein. The other two cases (*Berg* and *Chatham*) contributing to this "conflict" were pre-trial motion rulings wherein the courts were seemingly unaware of the court of appeals' decision herein.[10] Thus Appellant's suggested analogy to the legitimate district

[8] Appellant cites (page 9, n.3, Appellant's petition) United States v. Fogelman Management Corp., P-H E.O.H. REP., §18,008 (W.D. Tenn., No. C-76-45, filed Feb. 5, 1976), where the defendants agreed to offer a large cash or rent settlement as an example of what would be "impermissible under the court of appeals' decision in this case." However, the *Fogelman* order was not entered on Feb. 5, 1975, as Appellant's brief indicates, but rather, on Feb. 5, 1976 - two months *after* the court of appeals' decision herein. Without speculating on whether something "impermissible" has occurred, Appellant seemingly did not consider U. S. v. Long to be controlling when it agreed to entry of the order. *See*, P-H E.O.H. REP., Report Bulletin 17 (Feb. 23, 1976).

[9] Four cases are cited for the proposition that money damages are available in Section 813 actions: United States v. Berg Enterprises, Inc., No. WPB-75-139-Civ-CF (S.D. Fla., decided Dec. 10, 1975); United States v. Chatham, No. 75-1222A (N.D. Ga., decided Dec. 24, 1975); United States v. Hilton-Sykes Rental Agency, Inc., P-H E.O.H. REP., § 13,727 (M.D. Fla., No. 74-322-Civ-T-H, decided Sept. 18, 1975); United States v. West Suburban Board of Realtors, P-H E.O.H. REP., §113,641 (N.D. Ill., No. 69-C-1460, decided Feb. 6, 1974).

[10] Although the court of appeals' decision herein remains inexplicably unreported in the official reporter system, the slip opinion was available to the government two months before *Chatham* and two and a half months before *Berg*. Why the respective district judges did not mention the only court of appeals decision on point is left to speculation; note also that the latest district court decisions from the 5th circuit, and the only decisions taking cognizance of the court of appeals' decision in U.S. v. Long, followed the latter's lead in denying monetary damages. United States v. Northside Realty Associates, Inc., No. 13,932 (N.D. Ga., decided Feb. 11, 1976); United States v. Mitchell, No. CA3-7887-G (N.D. Tex., decided June 16, 1976).

court conflict noted in *Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974), appears to be specious.

The second ground of Appellant's petition is:

> 2. The Attorney General "deems it necessary" to obtain an "other order" for money damages in Section 813 actions. Since Section 813 is silent regarding damage recoveries, an "ambiguity" exists the resolution of which is best had by interpreting Section 813 to implicitly authorize what is expressly provided for by Section 812. Additionally, this construction would square with conciliation agreements "regularly approved" by HUD under Section 810.

Appellant seems to invite an unintended legislative result by venturing into what we believe to be strained construction of an uncommonly clear statutory provision. Silence by Congress regarding money damages when enumerating the remedies available to the Attorney General becomes, according to Appellant, the origin of "ambiguity" which requires "construction"[11] of the Act. We disagree.

As the court of appeals held, a "fair reading" of Section 813 in its statutory context results in the conclusion that the words "or other order" contemplate "an order extending or implementing the equitable relief to be granted." This may include, as it did here[12], the implementation of a

[11] Appellant ignores in its construction efforts a "[v]aluable precept of statutory construction, the doctrine of *ejusdem generis*, [which] warns against expansively interpreting broad language which immediately follows narrow and specific terms." United States v. Insco, 496 F. 2d 204 (5th Cir. 1974); *see also*, United States v. Baranski, 484 F. 2d 556, 566 (7th Cir. 1973); this maxim, along with *noscitur a sociis*, is often wisely applied where words (*e.g.*, "other order") are capable of different meanings in order to avoid giving unintended breadth to the Acts of Congress. Jarecki v. G. D. Searle & Co., 367 U.S. 303 (1961); Equal Employment Op. Comm'n v. Detroit Edison Co., 515 F. 2d 301 (6th Cir. 1975).

[12] Following the precedent of United States v. West Peachtree Tenth Corp., 437 F.2d 221 (5th Cir. 1971).

comprehensive, affirmative action program. Furthermore, under the court of appeals' decision, the district judge may order refunded with interest all items of monetary relief which are appropriate to the subject of equitable restitution.[13]

Thus, the court of appeals has provided an important precedent whereby the government may not only secure swift declaratory and/or injunctive relief (including affirmative action programs, reporting requirements, etc.) without jury trials, but also *non-parties* to a Section 813 action may recover all discriminatory overcharges without ever having filed suit. Rather than impinge on judicial resources, as Appellant suggests, the common-sense approach of the court of appeals is likely to be a basis for substantial savings in judicial time and resources.[14]

We believe the Appellant to be on even more slippery legal footing when it argues that the Attorney General may seek and recover whatever he "deems necessary". As held by the court of appeals, what Congress meant was that, *among the range of declaratory or preventive orders available under Section 813*, the Attorney General might choose the appropriate relief. The words "preventive" and "order" have always had equitable relief connotations in our jurisprudential system. Reading in traditional tort relief in the

[13] *E.g.*, "ill-gotten gains" such as higher rents charged on account of race or discriminatory security deposits.

[14] Although the court of appeals did not reach the issue, Respondent would most respectfully suggest that if Section 813 were construed to permit money damage recoveries, then the Seventh Amendment would command that a jury trial be preserved as to all legal issues. Curtis v. Loether, 415 U.S. 189, 195-6 (1974); Ross v. Bernhard, 396 U.S. 531, 538 (1970); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); U.S. CONST. AMEND. VII; F.R.Civ.P. 38(a), 42(b); Comment, The Seventh Amendment and Civil Rights Statutes, 68 Nw.U.L.REV. 503 (1973); Right to a Jury Trial in Civil Actions, 72 YALE L.J. 655, 692-93 (1962-63). Thus, liability to, and any damages due, each individual would have to be separately passed on by a jury if a defendant so requests.

form of money damages clearly strains the plain meaning of the words. It does not follow that (a) because Section 813 does not expressly provide for money damages, and (b) Section 812 does, then (c) Section 813 must implicitly provide for money damages.

Appellant concludes point two by stressing that its construction is supported by the "structure and spirit" of the Act; we most respectfully contend that the *wording* and *intent* of Congress are otherwise.[15]

Appellant concludes its petition with the following point:

> 3. "Preventive relief", in the context of Section 813, should be read expansively so as to include money damages. In this way public litigation can serve a private function, for "only" if damages are recoverable in Section 813 actions may "full enjoyment" of individual rights be secured.

Conceding that only a very "generous" and "expansive" reading of Section 813 could possibly result in its contended-for construction, Appellant sidesteps the basic issue of congressional intent. We submit that it is of no legal significance to this controversy that occasionally equitable

[15] Appellant also notes that the secretary of HUD "regularly" includes monetary relief in Section 810 conciliation agreements. These voluntary agreements are not made public [Section 810 (a)] and we have no way of knowing whether "regular" means "often" or "lately" or a "few times". What is clear is that the secretary has *only* the authority to use "[I]nformal methods of conference, conciliation, and persuasion". While parties to a contract may agree on almost anything, and the secretary may approve same, he has no authority, or even the slightest discretion, to impose money damages. Thus, Appellant's argument reduced to its core says no more than if the secretary is doing something not expressly provided for, it would be "anomolous"if the Attorney General could not seek something not expressly provided for.

jurisdiction may provide legal relief or that damages may deter some racial discrimination in housing.[16] The only issue is whether the language in Section 813 can be "fairly read" to find a congressional intent to provide the Attorney General with the right to obtain money damages. The court of appeals said not.

The petition concludes with an emotional plea that only if the Attorney General may secure money damages in Section 813 actions may the victims obtain full enjoyment of their rights. Aside from ignoring the obvious fact that damages are available under Section 812 and in actions under 42 U.S.C. § 1982 in unlimited amounts along with free legal services, individuals have no rights under Section 813. The Attorney General, and only the Attorney General, may in his discretion bring Section 813 actions. If he is successful, and if the district court finds it appropriate, then non-litigants may benefit by not only opened housing, but also, restitutionary money relief.

The "enjoyment" that Congress desired to be made available to all is swift, sure opening of this nation's housing on a non-discriminatory basis. While we can envision ways Congress might have written more potent legislation,[17] it apparently felt it best to provide for actual and punitive damage recoveries to be had only by individuals in Section

[16] By arguing that the court of appeals erred because it supposedly did not feel damages would "prevent" racial discrimination, Appellant poses a most transparent false premise. Of course this policy issue was never argued before, or addressed by, the court. What it decided was only that it was not sensible or fair to read money damages into "preventive relief orders" available to the Attorney General in Section 813 actions.

[17] *Eg.*, making racial discrimination in housing a criminal offense; enjoining offenders from renting or selling housing for a period of time.

812 actions.[18] Thus, while the Attorney General's task is not easy, no one ever thought it would be.[19] Nevertheless, he has been far from unsuccessful. The present action is especially dramatic evidence on that point.

II.

SECTION 813 DOES NOT PROVIDE FOR RECOVERY OF COMPENSATORY MONEY DAMAGES

Arguing that the statutory power granted it under Title VII is the virtual analogue of its power under Section 813 of Title VIII, the government offers *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) as support for its assertion of authority.[20]

[18] There have been numerous class actions for damages, the most spectacularly ambitious being a recnt case brought by the Fair Housing Council of Bergen County against all the real estate brokerage agencies in the fifty communities serving Bergen County, N.J. (P-H E.O.H. REP., Report Bulletin 19, March 22, 1976).

[19] It is important to consider that in the government's scheme of things, as opposed to what Congress appears to have provided, that the Attorney General, *not* individuals, has the sole discretion in making the important decision as to whether to seek an 810 conciliation or institute a lawsuit for substantial money damages. This choice, which is a valuable one, is taken by the Attorney General from the citizen. Furthermore, to the extent damages are sought under Section 813, the individuals' rights to same under 42 U.S.C. §1982 or Section 812 would no doubt be proscribed

[20] Judge Higginbotham disposed of this same contention in a Section 813 action last month by noting that with Title VII "[T]he Congressional history made clear that Congress intended to grant to the Equal Employment Opportunity Commission the powers then granted to the Department of Justice under the bill, before amendment. Before amendment, the bill had directly granted to the Department of Justice the power to recover back pay." United States v. Mitchell, *supra*.

Reduced, this equates back-pay recoveries with compensatory damage recoveries. We see no basis for comparison.[21]

However, under the court of appeals' decision, equitable monetary relief is available to the government in Title VIII actions just as equitable monetary relief has been made available by at least one court in a Title VII action in which the government was a party. *United States v. Georgia Power*, 474 F.2d 906 (5th Cir. 1973). The question here is not what Congress should or could have done, but what it did. Borrowing from Mr. Justice Marshall's holding for an undivided court in *Curtis, supra* "[T]here is surely no basis for characterizing . . . compensatory . . . damages . . . as equitable relief." 415 U.S. at 197. Nor does Section 813 include a "[s]imple authorization of an action for . . . damages" *id.*, such as found in Section 812. This "[c]onspicuous silence [in Section 813] as to the right of the government to recover money damages . . . ." *Mitchell, supra*, is the best indication of congressional intent.

Therefore, we believe the fourth circuit court of appeals was right for the right reasons. As was forcefully said in the latest opinion on point, "[T]o read here this power [to award damages] into [Section 813] in the guise of statutory construction is simply substituting the judgment of the court for that of Congress . . . . [L]iberal construction, coupled with a judgment as to what ought to have been provided by Congress (in the judgment of the court) cannot either supply missing language or create ambiguity." *Mitchell, supra.*

[21] Also, most district courts are in general agreement that damages are not recoverable in Title VII actions. Van Hoomissen v. Xerox Corp., 368 F.Supp. 829, 835-38 (N.D. Cal. 1973); Howard v. Lockheed-Georgia Co., 372 F.Supp. 854, 855-56 (N.D. Ga. 1974) ("If Congress had intended Title VII to authorize actions for compensatory damages, it would have made clear that desire.") Loo v. Gerarge, 374 F.Supp. 1338, 1341-42 (Hawaii 1974).

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition should be denied.

Respectfully submitted,

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